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No. 91-7580

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the special issues of the Texas capital-sentencing statute provided an adequate vehicle under the Eighth Amendment for consideration of Petitioner's youth, positive character traits and family background.

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RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, hereinafter "the Director," by and through the Attorney General of Texas, and files this Brief.

OPINION BELOW

The opinion of the *en banc* Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief to Petitioner, hereinafter "Graham," is reported at 950 F.2d 1009 and included in the Joint Appendix, hereinafter "JA," Volume II 543 *et seq.*

JURISDICTION

Graham has invoked the jurisdiction of this Court under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Graham bases his claims upon the eighth and fourteenth amendments to the United States Constitution. He challenges the application of Article 37.071 of the Texas Code of Criminal Procedure, which, as in effect at the time of Graham's trial, provided as follows:

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> * * * * *
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Graham was convicted in the 182nd Judicial District Court of Harris County, Texas, on October 28, 1981, of the capital offense of murder of Bobby Grant Lambert during the course of committing robbery. After a separate hearing on punishment, resulting in the jury's affirmative responses to the two special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981), a death sentence was assessed on October 30, 1981. Graham's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on June 12, 1984. *Graham v. State*, No. 68,916 (Tex. Crim. App. 1984). Certiorari review was not sought.

After an execution date was scheduled for July 30, 1987, Graham sought state habeas corpus relief. The execution date was rescheduled on three occasions, during which time a competency examination was conducted, the trial court held an evidentiary hearing, and state habeas relief was denied by the

Court of Criminal Appeals. *Ex parte Graham*, No. 17,568-01 (Tex. Crim. App. Feb. 19, 1988).

On February 23, 1988, two days prior to his scheduled execution date of February 25, 1988, Graham filed a petition for writ of habeas corpus and moved for a stay of execution in the United States District Court for the Southern District of Texas, Houston Division. The next day, the district court denied the writ and the stay application, but a panel of the Court of Appeals for the Fifth Circuit stayed Graham's execution. On August 31, 1988, the panel affirmed the district court's judgment. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir. 1988), JA II 506, but on July 3, 1989, this Court vacated the Fifth Circuit's judgment and remanded for reconsideration in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989).

On remand and after supplemental briefing, the panel, Judge Jolly dissenting, reversed the judgment of the district court on March 7, 1990, and remanded the case. *Graham v. Collins*, 896 F.2d 893 (5th Cir. March 7, 1990), JA II 525. On June 4, 1990, however, the court of appeals granted Respondent's suggestion for rehearing *en banc*. *Graham v. Collins*, 903 F.2d 1014 (5th Cir. 1990) (en banc), JA II 542. On January 3, 1992, the *en banc* court affirmed the district court's denial of habeas corpus relief. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), JA II 543. On June 8, 1992, the Court granted Graham's petition for writ of certiorari, JA II 612.

B. Statement of Facts

On May 13, 1981, Graham accosted Bobby Grant Lambert in the parking lot of a grocery store in Houston, Texas, and attempted to rob him. SR[1] XVII at 241-43, 326. When Lambert resisted, Graham put a pistol to Lambert's head. *Id.* at 327-30. Lambert dropped his groceries, and Graham shot him in

[1] "SR" refers to the state record of Graham's trial and appeal; "Tr." refers to the state transcript.

the chest. *Id.* at 332-36. As Graham fled, Lambert stumbled back into the grocery store, where he died. SR XVI 59-63.

At the punishment phase of trial, after Graham had been found guilty of the capital murder of Lambert, the state introduced evidence that Graham committed nine aggravated robberies against thirteen victims within one week of his commission of capital murder. Graham, armed with either a pistol or a shotgun, shot one person in the neck, pistol-whipped three others, stole five vehicles at gunpoint, and kidnapped and raped another victim.

On May 14, 1981, Graham entered Clinton Jones' van and pointed a pistol at Jones' head. Graham took Jones' watch and wallet, struck him with the pistol, shot him in the neck, and stole Jones' van. SR XIX 125, 304-09. That evening, Graham approached Linda Jennings and a friend at a carwash. *Id.* at 96-97. Graham entered the car, pointed a pistol at the pair, and drove off in their car. *Id.* at 106-10.

On May 15, 1981, Graham approached Yale Salsgiver in a parking lot and requested a ride. SR XX 363-64, 466. Once in Salsgiver's truck, Graham pulled a shotgun, and he and Salsgiver struggled for possession of it. *Id.* 363-64, 470-71. Salsgiver was able to escape, and Graham drove off in the truck. *Id.* At approximately 6:30 p.m. the same day, Graham approached Emory Dedman in his office's parking lot and requested a jumpstart for his van. SR XIX 79. As Dedman raised the hood of his car, Graham pulled a shotgun and forced Dedman into the van. He robbed Dedman of his watch, money and car keys, and drove off in Dedman's car. *Id.* at 80-88. Later that evening in yet another parking lot, Graham, again brandishing a shotgun, forced Richard Carter to kneel behind his car and robbed him of his wallet, money, tool box and hat while keeping the shotgun one inch from Carter's head. *Id.* at 274-85. Graham then struck Carter with the shotgun and left in his own car. Later that evening in the same parking lot, Carter again

encountered Graham, who still carried the shotgun. *Id.* at 289-92.

On May 18, 1981, Graham and an accomplice approached Ernest Doakes in an apartment complex parking lot, where Graham entered Doakes' car and took Doakes' money at gunpoint. SR XIX 250-56. Graham and his accomplice drove off in Doakes' car. *Id.* at 257. Also on May 18, Graham, armed with a pistol, approached Mohen Nemefolli and a friend in a hotel parking lot and demanded money. SR XX 334. When Nemefolli objected, Graham hit him with the pistol and then stuck it in Nemefolli's face, *id.* at 451-53, before absconding with a wallet, money and jewelry. *Id.* at 335, 454, 459.

On May 19, 1981, Graham approached Richard Sanford in a parking garage, where he forced Sanford at gunpoint into Sanford's car. SR XIX 229-31. Graham relieved Sanford of his watch, ring, wallet and money, and threatened to kill him, *id.* at 230-37, following which he ordered Sanford out of the car and frisked him, *id.* at 240-41, before fleeing. *Id.* at 242-43.

On May 20, 1981, Graham requested a ride from Lisa Blackburn, a cabdriver. SR XX 383-84. Once in the cab, Graham pulled a pistol and took Blackburn's wallet, money and personal property. *Id.* at 386-90. After threatening to rape Blackburn, Graham hit her in the face and forced her to drive to an abandoned apartment, *id.* at 392-93, where he fondled her genitalia, raped her vaginally and attempted to rape her anally. *Id.* at 394-403. Graham then forced Blackburn to drive to her apartment, where he gathered some of her property and instructed her to orally copulate him. *Id.* at 403-413. Graham fell asleep, and Blackburn took his pistol and called the police. *Id.* at 413-16.

The state also introduced testimony from a juvenile probation officer regarding Graham's bad reputation. SR XX 442-43.

The only testimony Graham produced at the punishment phase of trial was that of his stepfather and grandmother. Graham's stepfather, Joe Samby, testified that Graham, who lived and worked with his father, would visit his mother once or twice a week. SR XX 475-76. According to Samby, Graham was pleasant and cooperative, never fought with Samby and was never violent. *Id.* at 477-78. Graham loved and was very close to his mother, a "nervous type" who was currently on medication, and attempted to provide food and clothes for his two children. *Id.* at 478-79.

Graham's grandmother, Erma Chron, testified that Graham stayed with her intermittently, from ages three to twelve, because his mother was hospitalized numerous times for a nervous condition that Chron classified as mental illness. SR XX 481-83. While Graham was living with Chron, he attended church and school, was never violent and never possessed any weapons or caused any problems. *Id.* at 485-86.

At the conclusion of the punishment hearing and prior to the jury's deliberations on the punishment special issues, the trial court instructed the jury, *inter alia*, as follows:

> It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues", in this charge. The Court instructs you further, however, as follows:
>
> The mandatory punishment for capital murder is death or confinement in the penitentiary for life.
>
> The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before

any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the jury's deliberation.

If ten (10) jurors or more vote "No" as to any Special Issue, then the answer of the Jury shall be "No" to that issue, and the Foreman will so record the Jury's answer by signing his name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "No", then there shall be no answer for that Special Issue and the Foreman should not sign his name to any answer form for that Special Issue.

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

* * * * * *

Under the instructions herein given, it will not be proper for you, in determining the penalty to be assessed, to fix the same by lot, chance, or any system of averages, or any other method than by a full, fair and free exercise of the opinion of the individual jurors under the evidence submitted to you.

JA I 9-10, 11.

In closing argument, defense counsel urged Graham's youth as a basis for a life sentence:

> The first defense counsel's argument included the following:
>
> > "We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do

we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own. . . . Gary Graham is a young man. No doubt about it. . . . A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget. . . . I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given that opportunity. . . . Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face. He shot an individual and

he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe. . . ."

Graham's other counsel argued in a similar vein, stating:

" . . . there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish. . . . We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are

young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. . . . because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. . . ."

Graham, 950 F.2d at 1016, JA II 480-83; *see* 485-88, JA II 555-57.

SUMMARY OF ARGUMENT

There is no merit to Graham's claim that the Texas capital-sentencing statute operated to prevent his jury from giving mitigating effect to evidence he introduced at the punishment phase of his capital murder trial. The states are free, within constitutional limits, to channel the sentencer's consideration of mitigating evidence, and in so doing, minimize the possibility of arbitrariness and emotional responses to the evidence; including verdicts based on mere sympathy. The Texas scheme accomplishes this through special issues propounded to the jury at the punishment phase, an arguably more rational system than the "weighing" statutes employed by some states. Moreover, the constitutionality of the Texas scheme was confirmed in *Jurek v. Texas*, 428 U.S. 262 (1976), which this Court continues to cite approvingly and on which the court below relied heavily in rejecting Graham's constitutional challenge.

Graham's reliance on *Penry v. Lynaugh*, 492 U.S. 302 (1989), is misplaced. The *Penry* Court held that supplemental jury instructions were required to allow for Penry's evidence of mental retardation and childhood abuse to be given mitigating effect. In so holding, the Court found that this evidence could not be fully considered within the special issues and that Penry's retardation, because it was a permanent condition, was a two-edged sword that actually supported an affirmative answer to the future dangerousness inquiry of the second special issue. Graham's youth, conversely, is a transitory quality, the mitigating effect of which necessarily may be fully considered as it relates to future dangerousness.

The court of appeals faithfully adhered to both *Jurek* and *Penry* in rejecting Graham's constitutional challenge. That court correctly found that Graham's punishment-phase evidence could be fully considered within the Texas statutory questions, and Graham has offered nothing to demonstrate what qualities of his youth or other evidence could not be given mitigating effect in the Texas scheme.

Although Graham purports to rely on *Penry*, his claim is so extensive as to constitute a facial challenge to the Texas statute. If so construed, this claim would require that *Jurek* be overruled and is, therefore, a new claim that is barred by *Teague v. Lane*, 489 U.S. 288 (1989). Alternatively, this claim is meritless in light of the continued validity of *Jurek*, as the court of appeals found.

If construed as a claim for supplemental instructions, as in *Penry*, Graham's constitutional challenge likewise fails. Graham has neither identified the relevance of his mitigating evidence outside the scope of the special issues nor suggested what instructions might be given to cure the defect he believes to exist. No overt action of the trial court even arguably circumscribed consideration of Graham's evidence, and trial counsel did not request additional jury instructions. There is simply nothing in the record to remotely suggest that a

reasonable juror might have understood the absence of a supplemental instruction to preclude consideration of Graham's mitigating evidence.

ARGUMENT

THE TEXAS CAPITAL-SENTENCING STATUTE COMPORTS WITH THE REQUIREMENTS OF THE EIGHTH AMENDMENT.

A. The states are allowed wide latitude in guiding capital sentencing juries' consideration of mitigating evidence.

To pass constitutional muster, a state capital-sentencing scheme must perform two functions. First, it must suitably direct and limit a sentencing jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell and Stevens, JJ.). To accomplish this, the statute must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Second, the statute must allow the sentencer to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (original emphasis) (footnote omitted). *See also McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987) (summarizing the two concerns underlying the Court's capital sentencing precedents).

In the case at bar, Graham challenges the Texas statute with regard to the second function: the extent to which the sentencer is able to consider and give effect to relevant

mitigating evidence. According to Graham, his jury "was unable to voice the conclusion that [his] youth justified a life sentence . . . . , " Petitioner's Brief, hereinafter "PB," 28, and his "troubled family background," PB 32, and "extensive mitigating evidence of religious devotion, concern for his children, love for his family, and acts of kindness," PB 39, could not be given full mitigating effect under the Texas statutory special issues. As the court below correctly determined, however, this argument is foreclosed by prior decisions of this Court.

While it is true that a capital sentencing scheme may not prevent consideration of relevant mitigating evidence, it is also true that there is more than one way in which the eighth amendment may be satisfied. "The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice. Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). Thus, in the context of mitigating evidence, there is a "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making the sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. 484, 490 (1990). The states remain free to fashion and apply, within constitutional limits, statutes that channel the sentencer's exercise of discretion and "need not grant the jury the choice to make the sentencing decision according to its own whim or caprice." *Id.* at 493. *See also Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion) (states are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty").

Consistent with these teachings is the Court's admonition that the Constitution does not require that the sentencer in a capital case be allowed to dispense mercy. While evidence of

the defendant's character and background is properly taken into account in determining the appropriateness of a death sentence, it is permissible to instruct the jury that its verdict may not be founded on mere sympathy. *California v. Brown*, 479 U.S. 538, 542 (1987); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("it is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"). It was on this basis that the Court rejected a contention that an anti-sympathy instruction prevented full consideration of mitigating evidence. "This argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration." *Saffle*, 494 U.S. at 492. "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." *Id.* at 495.

The efforts of the Texas Legislature to achieve rationality and evenhandedness in capital sentencing are represented in Article 37.071 of the Texas Code of Criminal Procedure, the constitutionality of which was confirmed in *Jurek v. Texas*, 428 U.S. 262 (1976). Central to the *Jurek* Court's holding was the recognition that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 273-74. As the court below noted, 950 F.2d at 1027-28, JA II 584-86, this Court has continued to cite *Jurek* with approval on numerous occasions. *E.g.*, *Saffle*, 494 U.S. at 492; *Blystone*, 494 U.S. at 303. Indeed, even the dissent in *Blystone*, which believed the Pennsylvania statute did not adequately allow for individualized sentencing, opined that "the Texas statute upheld in *Jurek* does not deprive the jury of its ability to determine the propriety of the death sentence in a particular case." *Id.* at 321 (Brennan, J., dissenting). "Instead, by focusing on the deliberateness of the defendant's actions and his future

dangerousness, the [statutory punishment] questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability." *Id.*

That the Texas statute focuses a capital jury's punishment-phase deliberations on relevant sentencing concerns is not only constitutionally permissible, it is constitutionally appropriate. Texas has thereby attempted to assure that the sentence is a reasoned moral response rather than an emotional response to the evidence. By contrast, statutory schemes that allow the jury to give mitigating weight to aspects of the defendant's character or background--regardless of their relevance to the defendant's culpability or any other constitutionally recognized sentencing concern--create a risk that the jury's emotional response to the evidence will result in an arbitrary dispensation of mercy. In arguing that the jury must be able to weigh factors such as youth, Graham implicitly asserts a constitutional right to a weighing statute. The Constitution does not compel the states to employ such a scheme, however, and the decision of the Texas Legislature to provide an arguably more rational sentencing structure must be respected.

B. The Texas capital-sentencing statute complies with the individualized sentencing requirement of the eighth amendment in all but a narrow set of cases.

Among the substantive limitations imposed on the states by the eighth amendment is the requirement that the death penalty be assessed only after an individualized sentencing procedure, *Lockett v. Ohio*, 438 U.S. at 604-05, which requires that the jury give a reasoned moral response to relevant mitigating evidence of the defendant's character, background, and the circumstances of the offense during its punishment deliberations. *California v. Brown*, 479 U.S. at 545. Individualized capital sentencing is constitutionally required for the same reasons that it long has been required in non-capital

cases: society's interests in retribution, deterrence and rehabilitation. *See, e.g., Williams v. New York*, 337 U.S. 241, 248-49 n.13 (1949).

As the Court recognized in *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986),. however, not everything that a defendant introduces in mitigation of punishment is "relevant mitigating evidence." Rather, evidence is constitutionally relevant to the jury's punishment considerations when it pertains to constitutionally recognized mitigating factors. The Court's eighth amendment jurisprudence has recognized and defined two such factors that relate to society's interests in inflicting punishment: the defendant's personal moral culpability for the crime and his future dangerousness. The Constitution requires that the jury take into account the defendant's culpability because that relates to society's interest in exacting retribution for transgressing its laws. *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (heart of the retribution rationale is that sentence be directly related to the defendant's culpability). Similarly, whether a particular defendant probably will be a danger in the future is relevant to society's concern of rehabilitating criminal offenders. *Skipper v. South Carolina*, 476 U.S. at 5; *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983). Thus, in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), where the petitioner claimed that evidence of his good disciplinary record in prison reflected aspects of positive character traits that could not be given effect by the jury in answering the second punishment issue, the Court noted that such evidence encompassed nothing more "than those matters fully considered by the jury when it was asked to answer the second Special Issue," *i.e.*, his probable future dangerousness and his capacity for rehabilitation. 487 U.S. at 178 (plurality opinion).

Evidence of a defendant's character or background has mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character proffered in mitigation of punishment.

> [E]vidence about the defendant's background and character is relevant *because of the belief, long held by this society,* that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring) (first and second emphases added, third emphasis in original); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Unless the defendant can demonstrate some connection between his crime and his proffered evidence, he does not show that he is less culpable than any other person. Without a nexus between the crime and the defendant's evidence of his reduced culpability, the evidence can provide only a basis for the jury to exercise sympathy for the defendant, and a decision based on only sympathy cannot be a reasoned moral response to the defendant's culpability. Conversely, if such a nexus is demonstated, the jury's punishment verdict will be a reasoned moral response to the evidence.

Finally, although cases such as *Lockett* govern the factors the jury must be permitted to consider in making its sentencing decision, the Court never has promulgated "rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. at 490. "States are free to structure and shape consideration of mitigating evidence `in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990), quoting *Franklin v. Lynaugh*, 487 U.S. at 181 (plurality opinion). A state's capital-sentencing statute complies with constitutional requirements if it

provides the jury with *a* vehicle for considering mitigating evidence. *Boyde v. California*, 494 U. S. at 380-84 & n.5;[2] *Saffle v. Parks*, 494 U.S. at 491-92. Thus, a death sentence should not be set aside unless there is a "reasonable probability" that the jury would have interpreted instructions to preclude effective consideration of the mitigating force of the defendant's evidence, as that evidence was proffered at trial. *Boyde v. California*, 494 U.S. at 380-84 & n.5. A defendant is entitled to proffer any aspect of his background, character, or offense in mitigation of a death sentence, but the eighth amendment is violated only if, under a particular scheme, evidence that is probative of a reduced culpability or capacity for rehabilitation cannot result in a sentence less than death. Following *Boyde* and *Saffle*, it is clear that the potential for unconstitutional application of Texas' scheme identified in *Penry* is limited to those circumstances in which the statutory issues so limit the jury's deliberations that there exists a reasonable probability that relevant mitigating evidence could not establish a reasonable doubt as to an affirmative response to those issues.

At the time of Graham's trial, Texas allowed juries in capital murder trials to consider the defendant's personal moral culpability and future dangerousness by having the jury answer

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[2] For example, in *Boyde*, the defendant urged that evidence he won a dance contest in prison demonstrated an absence of future dangerousness--a factor that Boyde argued could not be given effect under California's death penalty statute. As a threshold matter, the Court refused to consider Boyde's future dangerousness argument, because he did not proffer the evidence for that purpose at the time of trial. *Boyde v. California*, 494 U.S. at 382 n.5. Rather, Boyde presented the evidence as an aspect of his good character, and the Court held that the jury could give effect to such evidence insofar as it demonstrated the crime to be an aberration from an otherwise good character. *Id.* Despite the fact that the jury did not have what was arguably the most direct vehicle for giving mitigating effect to Boyde's evidence--a future dangerousness question--and despite the fact that the jury could not have given independent mitigating effect to this evidence if it also believed that Boyde's crime was not an aberration, the Court found no eighth amendment violation because the jury had *a* fair vehicle for giving effect to that evidence.

two (or, if raised by the evidence, three) questions at the punishment phase.[3] The questions, particularly the second one concerning the defendant's probable future dangerousness, have been interpreted as allowing the defendant to bring before the jury "whatever mitigating circumstances he may be able to show." *Jurek*, 428 U.S. at 272. Under the Texas scheme, the jury can given mitigating effect to any evidence that, if credited and given sufficient weight, logically can raise a reasonable doubt that any special issue should be answered affirmatively.

In *Penry v. Lynaugh*, the Court recognized that certain kinds of evidence offered by the defendant cannot be given mitigating effect in the Texas statutory scheme without supplemental jury instructions. There, the Court found that evidence of Penry's mental retardation and childhood abuse possessed relevance to his culpability outside the scope of the special issues. In such cases, to ensure that the defendant receives the individualized sentencing procedure required by the eighth amendment, the trial court must, upon request, instruct the jury in a manner that allows it to give mitigating effect to the evidence. 492 U.S. at 320-21.

Penry's holding is a limited one, as is obvious from the Court's analysis. Penry's mental retardation, exacerbated by the severe abuse he received as a child, was relevant to both his moral culpability and his capacity for rehabilitation. It was relevant to his culpability because it affected his ability to control his impulses and evaluate the consequences of his behavior, and it was relevant to his potential for rehabilitation because his inability to learn from his mistakes was a permanent condition that would not diminish with time. While recognizing that Penry's evidence was mitigating with respect to the first special

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[3] The text of the punishment questions is set out at pages 2-3, *supra*. If all of the questions submitted to the jury are answered in the affirmative, the defendant is sentenced to death. If any one is answered negatively, or not answered, the defendant is sentenced to life imprisonment.

issue on deliberateness, the Court found that it also had relevance to his culpability beyond the scope of the special issues. 492 U.S. at 324. Inasmuch as Penry's inability to control his impulses was relevant to whether he acted deliberately, it necessarily was the other aspect of his retardation--his inability to learn from his mistakes--that exceeded the scope of the first special issue. Moreover, it was precisely this latter aspect of Penry's mental retardation that the Court viewed as dual-edged, because it indicated future dangerousness and, thus, was relevant to the second issue only as an aggravating factor. *Id.* Given the nature of Penry's evidence, the jury had no vehicle through which to give a reasoned moral response to the evidence, and the proceedings deprived Penry of individualized sentencing.

Following *Penry*, numerous death-sentenced inmates have asserted that evidence they introduced at their trials also comes within *Penry*'s ambit. Both the Texas Court of Criminal Appeals and the lower federal courts have looked for guidance not only to the decision in *Penry* but also to this Court's subsequent decisions, which continue to cite *Jurek* with approval, persuasive evidence of the validity of the Texas statute with respect to a wide range of mitigating factors. Accordingly, the courts have affirmed convictions and death sentences in cases in which it is clear that the jury was able to give effect to the mitigating evidence introduced by the defendant.[4] On the other hand, where the defendant's evidence was either irrelevant to the punishment issues or had relevance beyond the scope of the issues, the courts have not hesitated to vacate the resulting death sentences.[5] In every case, the courts

[4] *E.g., Cordova v. Collins*, 953 F.2d 167 (5th Cir.), *cert. and stay denied*, ___ U.S. ___, 112 S. Ct. 959 (1992) (evidence of intoxication at the time of offense); *Black v. State*, 816 S.W.2d 350 (Tex.Crim.App. 1991) (evidence of good character); *Ex parte Ellis*, 810 S.W.2d 208 (Tex.Crim.App. 1991) (evidence of drug and alcohol intoxication).

[5] *E.g., Mayo v. Collins*, 893 F.2d 683 (5th Cir.), *modified*, 920 F.2d 251 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 95 (1991); *Clark v. Collins*, No. H-88-1296 (SD Tex. 1990), *appeal docketed*, No. 91-

have unerringly followed the *Penry* Court's reasoning to determine whether the punishment hearing comported with the constitutional requirement of individualized sentencing.

C. The court below correctly applied this Court's jurisprudence in rejecting Graham's constitutional challenge to the Texas statute.

The court below faithfully honored this Court's capital-sentencing precedents in deciding the constitutional issue presented by this case. Adhering to the rationale of *Jurek* and applying the lessons of *Franklin* and *Penry*, the court of appeals analyzed Graham's punishment-phase evidence and concluded that "not only Graham's youth but also his other mitigating evidence could adequately be taken into account in answering the special issues, particularly the second." 950 F.2d at 1033, JA II 600-01. The court below, not surprisingly, found considerable guidance in the striking similarities between the facts of *Jurek* and those of the instant case.

With regard to Graham's claim that the Texas special issues do not permit consideration of his youth as a mitigating factor, the court of appeals held that *Jurek* is controlling.

> The Supreme Court's opinion in *Jurek* affirmatively reflects that the defendant was "22 years old at the time" of the offense,

2026 (5th Cir. January 15, 1991); *Ex parte Williams*, ___ S.W.2d ___, No. 71,403 (Tex.Crim.App. June 24, 1992); *Ex parte Sterling*, No. 71,385 (Tex.Crim.App. April 29, 1992); *Ex parte Modden*, No. 71,312 (Tex.Crim.App. February 12, 1992); *Ex parte Bell*, No. 70,946 (Tex.Crim.App. November 6, 1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex.Crim.App. 1991); *Ramirez v. State*, 815 S.W.2d 636 (Tex.Crim.App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex.Crim.App. 1991); *Gribble v. State*, 808 S.W.2d 65 (Tex.Crim.App. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2856 (1991). In each of these cases, the defendant introduced evidence of physical and/or sexual abuse as a child, arrested mental or emotional devlopment, mental retardation, and/or brain damage.

> and, in upholding the death sentence and the Texas scheme, quotes the portion of the Court of Criminal Appeals' opinion stating that in answering the second issue the jury can consider "`the age of the defendant.'" *Jurek* thus squarely answers the question of whether "youth" is adequately taken into account by the second special issue. . . . Moreover, *Penry* itself involved a twenty-two-year-old defendant, and the opinion contains no suggestion whatever that this fact was one which could not be adequately taken into account in answering the statutory special issues.

950 F.2d at 1030, JA II 591-92 (citations and footnote omitted).[6]

Similarly, the Fifth Circuit held that Graham's other punishment-phase evidence could be considered and given effect through the special issues. The court found that Graham's "rather mild evidence of normal, good--though not exceptionally good-- character,"[7] *id.* at 1032, JA II 597-98, did not have

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[6] In finding that "youth" includes defendants who were twenty-two years old at the time of their offenses, the court of appeals thus agreed with the Texas Court of Criminal Appeals, which has described a 23-year-old defendant's youth as having mitigating quality. *See Lackey v. State*, 819 S.W.2d 111, 129 (Tex. Crim. App. 1991), cited in *Graham*, 950 F.2d at 1030 n.25.

[7] The court below correctly characterized Graham's character evidence as "mild" in that it consisted of only conclusory statements that he was an obedient, mild-mannered child who performed household chores and tried to support the two children he had sired out of wedlock by the age of fifteen. Moreover, this evidence was less than compelling in that it consisted entirely of the testimony of close relatives, "witnesses who had a definite interest in seeing that [Graham] was not sentenced to death." *Parker v. Dugger*, 498 U.S. ___, ___, 111 S. Ct. 731, 746 (1991) (White, J., dissenting).

substantial mitigating value apart from their obvious relevance to the special issues.

With regard to Graham's character evidence, the court reasoned as follows:

> It appears to us that the principal mitigating thrust of all this evidence is to suggest that the events of May 13-20 were aberrational and atypical of Graham's true character and that he thus had potential for rehabilitation, and would not be a continuing threat to society. As such, the mitigating force of this evidence can adequately be given effect under the second special issue.
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> This evidence does not seem different in kind from that before the Supreme Court in *Jurek*, where the defendant's father testified that "the petitioner had always been steadily employed since he had left school and that he contributed to his family's support." *Id.* at 2954. Nor does this sort of character evidence seem other than wholly typical of what might be expected in a vast number of cases. As noted, were evidence of this kind held to invoke *Penry*, then *Jurek* and the Texas statutory scheme would for all practical purposes be wholly eviscerated.

Id. at 1032-33, JA II 598 (footnote omitted).

The court also found that Graham's evidence of his upbringing--that his mother "was hospitalized, commencing when he was approximately three, with . . . a `nervous condition' or `mental illness,'" *id.* at 1033, JA II 600--did not require a special jury instruction.

> There was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject. Further, the entire context in which this testimony was presented, from the point of view both of Chron's testimony as a whole and of all the defense evidence at the sentencing hearing, suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like, or that he had any mental or psychological problems. The entire thrust of the defense evidence, both from Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems" . . . .

Id., quoting *Penry*, 492 U.S. at 319.[8]

Graham challenges the analysis of the court below on several grounds, none of which is persuasive. First, he makes much of the fact that the Texas Legislature has seen fit to amend the statute. PB 19-20. The amendment upon which Graham

[8] The insubstantiality of Graham's evidence of a troubled childhood is readily apparent. For instance, Johnny Paul Penry's mother "had frequently beaten him over the head with a belt when he was a child. Penry was also routinely locked in his room without access to a toilet for long periods of time. As a youngster, Penry was in and out of a number of state schools and hospitals . . . . " *Penry*, 492 U.S. at 309. Similarly, Monty Lee Eddings had "a turbulent family history, of beatings by a harsh father, and of severe emotional disturbances . . . . ". *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). *See also Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (describing defendant's mitigating evidence of a troubled childhood, including a history of inhaling gasoline, a wandering mind, an impoverished family and a father who died of cancer).

relies might be accurately characterized as a legislative overreaction to the concerns the Court voiced in *Penry*. That the legislature believed an amendment was appropriate does not prove that the amendment was necessary or that the former statute was invalid. This point is illustrated by *Boyde v. California*, where the Court upheld a statute that had been amended since the petitioner's trial. 494 U.S. at 374 n.2.

Graham also attaches significance to the Oregon Supreme Court's overruling of a similar statute. PB 20-21. Regardless of the result reached by that court, however, this Court is the final arbiter of federal constitutional issues. If the decision of the Oregon court is incorrect, as the Director believes, it would not be the first time that that court has misapplied federal constitutional law. *See, e.g., Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982) (certiorari granted because "that court took an overly expansive view of the Double Jeopardy Clause"); *Oregon v. Matthiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] too broadly"). That a state appellate court reached a different result in a similar case is of no significance to the constitutional issue before the Court in the case at bar.

In addition, Graham complains that the trial court's definition of "criminal acts of violence" included some relatively minor offenses. PB 8. Thus, Graham argues, "[a]ny reasonable juror would have associated such acts exclusively with juveniles, and hence would have concluded that . . . Graham's youth required a `yes' answer to the second special issue." PB 30 n.30. There are three answers to this complaint, the first being that the trial court's comments that Graham deems objectionable were but part of a broad description of "criminal acts of violence" that the court and the attorneys discussed with the venire members during voir dire.[9] It is highly unlikely, therefore, that the jury

[9] *See, e.g.*, SR III 52 ("hit him, cut him, shoot him, or rob him"), *id.* at 106 ("pull a knife and try to cut off someone's ear . . . pull a gun"), *id.*

was misled by the definitions to which Graham refers. Second, the statutory terms at issue relate to matters that might support affirmative answers to the special issues, *i.e.*, "aggravating" factors that have no logical connection to the inquiry as to whether a rational jury could give effect to Graham's "mitigating" evidence. Third, and of greatest import, is that the jury had before it extensive testimony of a number of serious violent crimes Graham had committed. Thus, regardless how much significance might be attached to the trial court's remarks in the abstract, they could not have affected the fairness of Graham's sentencing hearing. *Boyde* teaches that a punishment-phase instruction will pass constitutional muster if there is no reasonable likelihood that the jury understood the challenged instruction to prevent the consideration of relevant mitigating evidence. 494 U.S. at 386. Under *Boyde*, Graham's trial was constitutionally sound because no juror could have taken the absence of an instruction--the substance of which Graham has yet to suggest--to preclude consideration of his punishment-phase evidence. *See, generally, Henderson v. Kibbe*, 431 U.S. 145, 156 (1977) ("[T]he respondent's burden is especially heavy because no erroneous instruction was given . . . An omission . . . is less likely to be prejudicial than a misstatement of the law").

These matters aside, the initial problem with Graham's substantive argument is that he does not identify the mitigating value of his youth outside its obvious relevance to the special issues. He asserts that "youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a death sentence is inappropriate in a given case." PB 28. The Director does not dispute this statement, generally, and does not disagree that there are qualities of youth to which society ascribes mitigating value. Nowhere, however, does Graham

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at 150 ("everything from slashing tires and property, up to robbery or murder"), SR IV 233 ("slapping somebody . . . murder or aggravated robbery"), *id.* at 250 ("where somebody takes a life"), *id.* at 309 ("shooting at someone . . . aggravated assault, robbery, aggravated robbery or murder").

specify just what characteristics of his age could not be evaluated within the Texas statutory framework. Much like the emperor's new clothes, Graham's argument exists in word only.

In addition to failing to identify the aspects of his youth that could not be considered within the special issues, Graham also fails to state what action the trial court might have taken to remedy the constitutional defect he perceives. While, in relying on *Penry*, Graham necessarily argues that his jury should have received additional instructions on mitigating evidence, his claim is in fact so broad that it is nothing less than a challenge to the facial validity of the Texas statute. As the court below observed, "to say that the second special issue is . . . inadequate to take youth into account, is necessarily to also say that it is inadequate to take into account any other mitigating force which is not wholly coterminous and synonymous with future dangerousness." 950 F.2d at 1031 n.27, JA II 595 n.27. Thus, to sustain Graham's claim, this Court must overrule *Jurek*. *Id.* As discussed, *supra*, at 16-17, 22, however, the Court has repeatedly reaffirmed the validity of *Jurek*.[10]

In any event, the trial court's punishment-phase instructions in no way circumscribed consideration of Graham's youth as a mitigating factor. The court told the jury that it was to consider "all of the evidence" admitted at both phases of trial and that its verdict could be reached only "by a full, fair and free exercise of the opinion of the individual jurors under the evidence submitted to you." JA I 10-11. In addition, the court instructed the jury that unanimous affirmative responses to the

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[10] If Graham is in fact asking that *Jurek* be overruled, his claim is a new claim that is barred by the rule of *Teague v. Lane*, 489 U.S. 288 (1989). While the Court held that *Teague* did not bar consideration of Penry's claim, 492 U.S. at 315, that claim did not require that *Jurek* be overruled. Similarly, if Graham is asserting the existence of a constitutional defect that can be cured by supplemental instructions, his claim likewise is not barred; conversely, if sustaining Graham's claim would necessarily require that *Jurek* be overruled, it is barred by *Teague*.

issues were required before a "yes" answer could be recorded on the verdict form. JA I 9-10. Thus, a single "no" vote would result in a life sentence. *See discussion, supra*, at 21 n.3. The sentencing proceeding at Graham's trial stands in stark contrast to the unconstitutional scheme the Court struck down in *McKoy v. North Carolina*, 494 U.S. 433, 439 (1990), which "allows one holdout juror to prevent the others from giving effect to [mitigating] evidence . . . . "

Graham's trial counsel did not request a special instruction, and "[i]n marked contrast to *Penry*, there is here nothing to suggest that defense counsel desired to have the mitigating force of youth presented or considered in any other manner than as a basis for a negative answer to the second special issue." 950 F.2d at 1031-32, JA II 595 (footnote omitted).[11] Thus, here, as in *Boyde*, 494 U.S. at 384, counsel's failure to lodge a trial objection "certainly is relevant to deciding how a jury would understand" the court's instructions. *See also Franklin v. Lynaugh*, 487 U.S. at 186 (O'Connor, J., concurring) (finding that prison disciplinary record constituted good character evidence that could be considered under the second special issue because "petitioner did not suggest [at trial] that his lack of disciplinary violations revealed anything more positive about his character than that"); *Wainwright v. Witt*, 469 U.S. 412, 431 n.11 (1985) (in deciding a claim of jury selection error, "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering"). In sum, the trial record in no manner suggests that a reasonable juror might have understood the absence of an instruction to prevent consideration of relevant mitigating evidence.

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[11] It is ironic that Graham's only trial objection to the Texas sentencing scheme was a pretrial motion arguing that the statute vested juries with unconstitutionally broad discretion. JA 39 *et seq.*; *see* 950 F.2d at 1017 n.11, 1032 n.28, JA I 39, *et seq.*; *see* JA II 559 n.11, 595 n.28.

In attempting to fit his situation within the rule of *Penry*, Graham makes several statements that are simply untenable. First, he asserts that "youth supports an affirmative answer to the second special issue because the jury must consider a longer period of time during which the young defendant may commit some violent act, than if he were a mature adult." PB 30.[12] Both common sense and this Court's decisions indicate just the contrary. As Graham himself argues, "[y]oung people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral judgments *than are their elders*." PB 26 (emphasis added). Put another way, youth "*is a time and condition of life* when a person may be most susceptible to influence and psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (footnote omitted) (emphasis added). It necessarily follows, then, that the disabilities of youth diminish and disappear with the passage of time.[13] Thus, were a juror

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[12] Graham's assertion rests on the faulty premise that a jury's answer to the second special issue turns on how many more years a defendant may live rather than the likelihood, *i.e.*, "probability" that he will engage in violent acts in the future. The Court's discussions of the future dangerousness inquiry lend no support to Graham's assumption. *See Skipper v. South Carolina*, 476 U.S. at 5; *Barefoot v. Estelle*, 463 U.S. at 902-03.

[13] *See, e.g.*, Maria M. Homan, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 Brook. L. Rev. 767, 778, 781 (1987) (adolescents' inability to understand society because of their youth and absence of education result in a violent response to their environment triggered by untempered emotion; there is evidence that juvenile propensity toward criminal activity diminishes with age); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. Rev. 503, 508 & n.13, 538 (1984) (a child may have difficulty choosing among options, but an adult will not; children usually are not considered to be culpable because of their age, but this changes once the child becomes an adult); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense. Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. Rev. 821, 911 (1988) (the progression from child to adult in maturity and experiencing time is the same as the progression from children

convinced that Graham's moral culpability was reduced because his crime was in some way attributable to his youth, that juror necessarily would reach the logical conclusion that Graham's propensity for violence would diminish as he grew older. This core attribute of the quality of youth underscores the correctness of the court of appeals' holding:

> [Y]outh is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory. Therefore, whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to society. Thus, the second special issue affords an adequate

to adults in developing responsibility for making blameworthy choices); Alison R. Faltersack, *Stanford v. Kentucky, The Minimum Age for the Maximum Penalty--Death*, 23 J. Marshall L. Rev. 453, 466 & n.94 (1990) (many believe these disabilities of youth begin to transform into a self-reliant responsible age of adulthood during early adolescence, including the ability to plan for the future while becoming accountable to society); Lawrence A. Vanore, *The Decency of Capital Punishment for Minors; Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. J. 757, 779 (1986) (when they become adults, minors obtain more privileges as well as responsibility and culpability in matters of law); Glenn M. Bieler, *Death be Not Proud: A Note on Juvenile Delinquent Punishment*, 7 N.Y.L. Sch. J. Hum. Rts. 179 (1990) (adolescence is the period of physical and psychological development from the onset of puberty to maturity, the transitional period between childhood and adulthood, and a stage of life lasting roughly from age 12 to age 19).

> vehicle by which the jury can give effect to the mitigating aspect of youth.

950 F.2d at 1031, JA II 593-94 (citation omitted). Other than his self-serving assertion, Graham offers nothing to show that youth is the sort of "two-edged sword" that the Court found Penry's mental retardation to be.

Graham next makes the incredible statement that "[t]he focus of the second special issue, on predicting future behavior, rather than assessing present culpability, thus precluded the jury from considering and giving effect to" his youth as a mitigating factor. PB 30. In so arguing, Graham ignores the Texas statutory elements of the offense of capital murder, which the state must prove beyond a reasonable doubt and which certainly focus on the defendant's present culpability in narrowing the class of persons eligible for the death penalty. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988) (describing how the Texas statute functions in a constitutionally sound manner). He further ignores the deliberateness inquiry of the first special issue, which also clearly addresses the defendant's present culpability. That the statute goes beyond constitutional requirements and requires the state to prove a probability of future dangerousness actually inures to the benefit of capital defendants, particularly youthful offenders such as Graham.

Moreover, almost two decades of experience with the Texas capital murder statute undermines Graham's argument. There are 450 Texas inmates whose juries assessed death sentences and who either have been executed, are on Death Row, or have had their death sentences reformed or commuted to life sentences; there are 161[14] inmates convicted of capital

[14] There are, in fact, 194 Texas inmates with capital murder convictions whose juries assessed life sentences. Five inmates with life sentences committed their offenses after August 31, 1991, in which case the state had discretion not to seek the death penalty. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 1 (Vernon Supp. 1992). The Director has not been able to ascertain whether the state waived the death penalty in those cases, and

murder whose juries assessed life sentences. *See* Affidavit of S. O. Woods, attached as an appendix to this brief. Of the prisoners aged 17-23[15] at the time of their offenses, 200 received death sentences and 79 received life sentences, and of the prisoners over age 23 at the time of their offenses, 250 received death sentences and 81 received life sentences. *Id.* Thus, 26.4% of all defendants convicted under the Texas capital murder statute, 28.4% of all youthful offenders and 24.7% of all non-youthful offenders with capital murder convictions received life sentences. Thus, there is a 15% greater relative probability that a youthful offender will receive a life sentence than will a non-youthful offender. These numbers hardly support Graham's assertion that the Texas capital sentencing statute operates unfairly to prevent consideration of mitigating evidence, including youth. *Cf. Sochor v. Florida*, ___ U.S. ___, 112 S. Ct. 2114, 2129 (1992) (Stevens, J., concurring in part and dissenting in part) (in capital cases reviewed by Florida Supreme Court between 1980 and 1991, the jury recommended life in only 19%).[16]

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they are not included in the above calculations. Also not included are 28 inmates who were under 17 when they committed their offenses and, therefore, could not have been sentenced to death. TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1992).

15 Twenty-three is the oldest age the courts have found to be youthful for purposes of mitigation of capital punishment. *See Lackey v. State, cited, supra,* at 24 n.6.

16 While, of those defendants convicted of capital murder, almost three-fourths received the death penalty, it is important to bear in mind that in Texas not all defendants who are charged with murder are exposed to the death penalty. The Texas statute narrows the class of those eligible for a death sentence by requiring the state to prove beyond a reasonable doubt, at the guilt-innocence phase of trial, the statutory elements of the offense of capital murder. Thus, the number of inmates referred to in the affidavit necessarily excludes all defendants who were charged with capital murder but pled guilty to a lesser offense or were found by a jury to be not guilty of capital murder. In Florida, by contrast, no narrowing takes place at the guilt-innocence phase of trial, and a defendant's eligibility for the death

The court below also reasoned, in conformity with this Court's eighth amendment jurisprudence, that Graham's evidence of good character could be considered within the special issues. In *Skipper v. South Carolina*, for instance, the Court reversed because the petitioner had not been allowed to introduce evidence in mitigation of punishment regarding his good behavior while in prison. The Court nonetheless commented that "not all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating." 476 U.S. at 7 n.2. *Skipper* thus stands for the proposition that only evidence that is relevant to the jury's sentencing decision must be admitted. *Skipper* is of particular relevance to the case at bar, in which *Graham* merely asserts, but does not demonstrate, the mitigating quality of his evidence beyond the scope of the special issues.

Similarly, in *Franklin v. Lynaugh*, the Court found that evidence of Franklin's good conduct while incarcerated was of such a nature that it was relevant to the second special issue.

> The only mitigating evidence introduced by petitioner was the stipulation that he had no record of disciplinary violations while in prison. It is undisputed that the jury was free to give mitigating effect to this evidence in answering the special verdict question regarding future dangerousness. While it is true that the jury was prevented from giving mitigating effect to the stipulation to the extent that it demonstrated positive character traits other than the ability to exist in prison without endangering jailers or fellow inmates, that limitation has no practical or constitutional significance in my view

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penalty is determined exclusively by whether an aggravating factor is found at the punishment phase. FLA. STAT. § 921.141 (1991); *see Sochor v. Florida*, 112 S. Ct. at 2117.

> because the stipulation had no relevance to any other aspect of petitioner's character.

487 U.S. at 185 (O'Connor, J., concurring). Where, as here, the special issues provided for plenary consideration of Graham's good character evidence, his claim must fail under the reasoning of Justice O'Connor's concurrence in *Franklin*. *See also Boyde*, 494 U.S. at 382-83 n.5 (that defendant won a dance contest while in prison constituted evidence of good character that could be considered under the California sentencing scheme).

The Fifth Circuit also correctly rejected the notion that Graham's upbringing somehow reduced his moral culpability. As that court observed, Graham made no showing that his actions were "attributable" to his disadvantaged youth. As discussed, *supra*, at 19, *Penry* requires that a defendant show a nexus between his criminal acts and his disadvantaged background in order to rely on the latter as mitigating evidence. The Fifth Circuit's opinion is faithful to the rationale of *Penry*.

Graham also quibbles with the Fifth Circuit's requirement that to prevail on a *Penry* claim, a capital defendant must demonstrate that the major mitigating thrust of his evidence exceeds the scope of the special issues. According to Graham, this standard constitutes an "elaborate system," PB 41, the "intricacy" of which "compels a complex two-part inquiry . . . ." PB 40. In fact, however, the court below reasoned in harmony with this Court's eighth amendment jurisprudence in rejecting Graham's claim. The court of appeals' analysis of which Graham complains is the same as that employed by Justice O'Connor in both *Franklin* and *Penry*, *i.e.*, whether the evidence to which the defendant ascribes mitigating value is such that it can be given mitigating effect within the framework of the Texas statute. The court of appeals' use of the term "major mitigating thrust" is nothing more than a shorthand phrase to identify the purpose for which the evidence was offered. As discussed, *supra*, at 31, both this Court's decisions and Graham's brief are replete with references to youth as a transitory condition, the mitigating

qualities of which dissipate as the defendant grows older. Thus, evidence of Graham's youth necessarily was susceptible of full consideration as it related to the future dangerousness issue, as evidenced by defense counsel's closing argument, *supra*, at 9-12, which emphasized Graham's capacity for personal growth and transformation to a more peaceful individual.

Graham also takes issue with what he characterizes as the court of appeals' "'permanence' requirement," PB 43, and the "requirement of 'elaboration'." PB 45. His arguments are wholly specious. As discussed, *supra*, at 21-22, a major concern of the *Penry* Court was the permanence of the defendant's mental retardation and how it supported an affirmative answer to the future dangerousness inquiry. Graham's youth obviously is of a different character, and he cannot in good faith argue otherwise. The court of appeals' "elaboration" requirement likewise constitutes nothing more than recognition that the relevance of mitigating evidence can be discerned from the purpose for which it was offered, an unremarkable proposition to which the *Boyde* Court adverted. 494 U.S. at 384, as did Justice O'Connor in her *Franklin* concurrence. 487 U.S. at 186.

Finally, Graham complains that "the court below erred in its insistence that [his] youth must somehow explain or excuse the capital offense in order to be constitutionally mitigating." PB 43 n.38. The hollowness of this argument is apparent from the only authority Graham cites to support it: *Payne v. Tennessee*, 501 U.S. ___, 111 S. Ct. 2597 (1991). That case does not stand for the proposition for which it is cited, and the quoted language does not appear on the pages to which Graham refers. The reasoning of the court below is consistent with *Penry* and other decisions of this Court.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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APPENDIX

AFFIDAVIT

My name is S. O. Woods. I am the Chairman of the State Classification Commission of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). In that capacity, I am the custodian of the records of all inmates in the TDCJ-ID. I have reviewed those records, and on July 30, 1992, they revealed the following:

There have been 50 executions carried out for capital murders committed after June 14, 1973. There are 364 inmates who have been convicted of capital murder for offenses committed after June 14, 1973, and are under sentence of death; there are 36 inmates whose juries returned death sentences that subsequently were reformed to life sentences by court action or commuted to life sentences by the Governor. The records of these 450 inmates reveal the following:

Age on Date of Offense	Number of Inmates	Age on Date of Offense	Number of Inmates
17	15	35	13
18	19	36	11
19	30	37	7
20	33	38	7
21	32	39	5
22	38	40	5
23	33	41	1
24	34	42	3
25	23	43	3
26	16	44	3
27	24	45	1
28	17	46	1
29	17	47	2
30	12	49	1

31	14	50	2
32	10	51	1
33	10	52	1
34	6		

Total 450

There are 194 inmates who have been convicted of capital murder for offenses committed after June 14, 1973, and whose juries returned sentences of life imprisonment. Twenty-eight of those inmates were under the age of seventeen when they committed their offenses, and five committed their offenses after August 31, 1991. The records of the remaining 161 inmates reveal the following:

Age on Date of Offense	**Number of Inmates**	**Age on Date of Offense**	**Number of Inmates**
17	11	32	2
18	9	33	2
19	13	34	4
20	15	35	2
21	12	36	1
22	11	37	2
23	8	38	4
24	5	39	1
25	17	40	1
26	5	41	3
27	3	42	1
28	11	43	5
29	2	47	1
30	5	52	1
31	4		

Total 161

I have read the above and declare under penalty that it is true and correct.

/S_____
S. O. WOODS
Chairman, State Classification Commission
Texas Department of Criminal Justice
Institutional Division

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 1992.

/S_____
NOTARY PUBLIC in and for
The State of Texas
My Commission Expires March 3, 1994